No. 80-737

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ; and EVA FLOYSTRUP,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellants. Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt organization existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

This action involves the validity of that portion of Berkeley's Election Reform Act of 1974 (Ord. No. 4700-N.S.) (hereinafter Act) which prescribes a $250 maximum on contributions to committees in support of or in opposition to ballot measures. In doing so, the Act deprives the citizens of Berkeley of the ability to effectively join together to convey vital information, as well as to receive such information, so that informed choices can be made on ballot measure issues. The Act represents an unacceptable attempt by the government to control the flow of information necessary for shaping the future of the city. In essence, the Act restricts access by the public to the marketplace of ideas.

PLF is especially concerned as a public interest organization because the Act is representative of attempts by other cities throughout California to control the flow of information necessary for making informed choices on ballot measure issues. *See* Jurisdictional Statement at 21-22. PLF's members, contributors, and supporters who reside in California are directly affected by such limitations. This Court, while recognizing a need for contribution limitations with respect to candidate elections, has rejected the need for contribution limitations with respect to ballot measure elections. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978). Moreover, three federal circuit courts have seen fit to reject contribution restrictions to committees in ballot measure elections. *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980); *C & C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978); *Schwartz v. Romnes*, 495 F.2d 844, 852-53 (2d Cir. 1974).

The courts have historically allowed the widest latitude for discussion and the narrowest range for its restriction. *Thomas v.*

Collins, 323 U.S. 516, 530 (1945). The Act infringes on the First Amendment rights of freedom of speech and association without serving any compelling governmental interest, and represents an undesirable intrusion into the lives of the citizens of Berkeley. Therefore, it is imperative that this Court note probable jurisdiction in this case and reverse the decision of the California Supreme Court.

SUMMARY OF ARGUMENT

The Act infringes on the First Amendment rights of freedom of speech and association. The First Amendment is accorded special protection in the political arena and includes both the right to acquire and disseminate information and the right to join together and make political contributions to advance political, legal, and economic arguments. The Act infringes on the First Amendment rights of the citizens of Berkeley by inhibiting their ability to disseminate and to receive all available information on ballot measure issues.

The stated goal of the Act, in seeking to restrict the speech of some elements of society in order to enhance the relative voice of others, has been rejected by this Court. In addition, the *actual* effect of the Act is contrary to its stated goal and is likewise violative of the First Amendment. Affluent contributors may conduct independent campaigns on ballot measure issues, free from any governmental limitations, while those who cannot afford to do so are limited in the amount they may contribute to ballot measure committees.

The Act serves no compelling governmental interest, and bears no reasonable relation to the achievement of its stated purpose. The reasons given by the California Supreme Court as justification for upholding the Act have been rejected by this Court. As such, the Act unconstitutionally infringes on the First Amendment rights of the citizens of Berkeley.

The Act represents an undesirable intrusion into the lives of the citizens of Berkeley by preventing complete access to the

marketplace of ideas. The California Supreme Court impermissibly endorses the guardianship of the public mind imposed by the Act, and rejects the notion that the public must be permitted to decide for itself matters of important public interest.

ARGUMENT

I

THE ACT INFRINGES ON THE FIRST AMENDMENT RIGHTS OF THE CITIZENS OF BERKELEY

The First Amendment to the United States Constitution guarantees in part that "Congress shall make no law ... abridging the freedom of speech ...." This is the most majestic guarantee contained in the Constitution. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-1 (1978). The dissemination of opinions on matters of public interest is an "unalienable right" and is the "matrix, the indispensible condition, of nearly every other form of freedom." *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 145, 149 (1967). This fundamental right has been made applicable to the states by the Fourteenth Amendment. *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 100 S. Ct. 2343, 2349 (1980).

The purposes of the First Amendment are stimulation of free discussion and interchange of ideas, *Buckley v. Valeo,* 424 U.S. 1, 14 (1976); protection of the "marketplace of ideas" from governmental infringement, *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1964); and promotion of intelligent self-government in a democratic system, A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 88 (1948), in order that "such freedom will ultimately produce a more capable citizenry and more perfect polity." *Cohen v. California,* 403 U.S. 15, 24 (1971). *See Consolidated Edison Co. v. Public Service Commission,* 100 S. Ct. 2326, 2331 (1980).

The First Amendment applies with special force to the political arena. *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971). Political expression is afforded the broadest constitutional protection in order to insure the "unfettered inter-

change of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Indeed, it is generally recognized that one of the original purposes of the First Amendment "was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299, 308 (1978). *See generally* A. MEIKLEJOHN, *supra*. The "freedom to think as you will and to speak as you think" is "indispensable to the discovery and spread of political truth." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

The protections of the First Amendment include the right of the recipient to acquire information as well as the right of the speaker to disseminate information. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976); *Pell v. Procunier*, 417 U.S. 817, 832 (1974). "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas . . . ." *Red Lion Broadcasting*, 395 U.S. at 390.

The First Amendment protects not only freedom of speech, but also freedom of association. Freedom of association has been recognized as a basic constitutional freedom which is closely allied to the freedom of speech and which lies at the foundation of a free society. *Buckley*, 424 U.S. at 25; *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). There can be no doubt that group association enhances the ability to advocate a position or view. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). Freedom of association encompasses the right to join together in a group to advocate political and governmental beliefs, *Healy v. James*, 408 U.S. 169 (1972), and legal and economic interests, *NAACP v. Button*, 371 U.S. 415 (1963). The right to make a political contribution is protected under the First Amendment as a freedom of association. *Buckley*, 424 U.S. at 22.

The general presumption in favor of the constitutional validity of legislation is not applicable in those instances where the legislation is challenged on the ground that it restricts the

preeminent freedoms secured by the First Amendment. *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 215 (1976). Pure speech is entitled to comprehensive protection under the First Amendment. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505-06 (1969). This Court has held that contributions to the political process are a form of pure speech, the limitation of which is deserving of strict scrutiny. *Bellotti*, 435 U.S. at 786 n.23; *Buckley*, 424 U.S. at 16-17. In light of the high purposes served by the First Amendment, the Act must be examined to determine its effects on this preeminent freedom.

The Act unduly infringes on the First Amendment right of the citizens of Berkeley to combine their financial resources in order to disseminate information on ballot measure issues, as well as to receive such information. The Act imposes a "direct quantity restriction[] on political communication and association by persons, groups, . . . and political parties." *Buckley*, 424 U.S. at 18. The effect of the Act is to prevent the citizens of Berkeley from receiving all available information on a given ballot issue in order that they may cast informed votes. This Court has recognized that government "may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). The Act also directly affects those who wish to effectively communicate information by restricting the financial ability of individuals to contribute to a committee in support or opposition to a ballot measure issue. "[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U.S at 19.

This Court has on several occasions recognized that the purported goal of acts such as this, which restrict the speech of some elements of society in order to enhance the relative voice of others, "is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49. *See Bellotti*, 435 U.S. at 785-86. As such, the Act in this case is constitutionally infirm.

However, the actual effect of the Act is contrary to its stated goal, and in itself is also unconstitutional. Affluent contributors may defeat the purpose of the Act with impunity

by conducting independent campaigns with their own financial resources. The California Supreme Court articulated the problem created by the Act in this case, without recognizing it as such, when it stated that, under the Act, large campaign contributors are free to spend unlimited amounts to conduct their own independent campaigns on ballot measures, but no one may contribute more than $250 to *committees* formed to support or oppose such measures. *Citizens Against Rent Control v. City of Berkeley*, 27 Cal. 3d 819, 829 (1980). The only remaining alternative for those who cannot afford to underwrite their own independent campaigns on ballot issues is to join together with others of like mind in order to maximize their financial resources. However, the Act precludes these people from contributing more than $250 each to advocate their position. One person alone may spend as much as his personal wealth will allow; two together, however, are limited to $250 apiece.

Citizens who ban together to promote issues which do not concern a large segment of the community, and which therefore cannot generate broad based financial support, are permitted to contribute only a limited amount of their own money in order to further their common interest. It is no answer to say that issues of limited public concern are any less deserving of constitutional protection than more popular issues. In fact, this Court has stated that First Amendment protection is accorded to dissemination of *all* information and ideas regardless of their social worth. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). "The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' " *Bellotti*, 435 U.S. at 790.

In essence, then, while wealthy contributors are not bound by the Act, the actual effect of the Act is to restrict the speech of small campaign contributors who must pool their financial resources to further their common goal. The Act thereby enhances the relative voice of those large independent contributors who can afford to conduct their own campaigns free of the Act's prohibition. This is likewise constitutionally impermissible. First Amendment protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public

discussion. *Buckley*, 424 U.S. at 49. *See Citizens Against Rent Control*, 27 Cal. 3d at 834 (Richardson, J., dissenting).

The Act infringes on the First Amendment rights of the citizens of Berkeley. In order for such infringement to be constitutionally permissible, the Act must serve a compelling governmental interest. As discussed more fully below, the Act does not serve any such compelling interest, and therefore violates the First Amendment.

II

THE ACT SERVES NO COMPELLING GOVERNMENTAL INTEREST

Limitations on contributions to the political process are subject to strict scrutiny under the First Amendment. In order for the City of Berkeley to properly infringe on the constitutionally protected freedom of speech of its citizens, the city must demonstrate the existence of a compelling governmental interest. "Even then, the [city] must employ means 'closely drawn to avoid unnecessary abridgment.' " *Bellotti*, 435 U.S. at 786. Further, when, as here, "it is shown that governmental action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960). This is a burden which the City of Berkeley cannot meet. Moreover, the actual effect of the Act is the opposite of what the city is seeking to accomplish.

In this case, the Court must examine, on the one hand, "the extent to which communicative activity is in fact inhibited" by the Act, "and on the other hand, the values, interests or rights served by enforcing the inhibition." L. TRIBE, *supra* at § 12-20. The restriction must be no greater than necessary to achieve the stated governmental interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *See* Bogen, *Balancing Freedom of Speech*, 38 Md. L. Rev. 387 (1979).

The reasoning of the California Supreme Court in upholding the constitutionality of the Act is a study in self-contradiction. The values allegedly served by the Act, as found by that court, are the prevention of perversion of the political process by large contributors and a reversal of the trend in voter apathy caused by such large contributions. The court cited *Buckley* for the proposition that the contribution limitation imposed by the Act "focuses precisely on the problem" the Act is purported to solve. *Citizens Against Rent Control*, 27 Cal. 3d at 831. However, the justification for upholding the contribution limitation in *Buckley* was the prevention of political corruption of *candidates* for elective office and the avoidance of a *quid pro quo* relationship. This Court recognized in *Bellotti* that the potential for corruption which exists in candidate elections simply does not exist with regard to ballot measures—while a candidate may be corrupted by the payment of money, there is plainly no one capable of being so corrupted with regard to ballot measures. *Bellotti*, 435 U.S. at 790-91. *See Let's Help Florida*, 621 F.2d at 199-200; *C & C Plywood Corp.*, 583 F.2d at 423, 425; *Schwartz*, 495 F.2d at 852-53.

The California Supreme Court then reasoned that the Act is necessary because "domination of the political process by large contributors leaves other citizens with a stilled voice in the very domain of our electoral system set aside for accomplishing the popular will," and leads to voter apathy. *Citizens Against Rent Control*, 27 Cal. 3d at 826-28. This is precisely the scheme permitted under the Act. Wealthy contributors may conduct their own independent campaigns free from any governmental limitation and subject only to the depth of their pockets. Those who cannot afford to conduct their own independent campaigns, and who must join together with others to maximize their financial clout, are limited in the amount of money they are permitted to contribute to committee efforts. The application of the Act will obviously still the voices of all but the wealthy and will lead to achieving that which it was designed to prevent.

In a further twist of logic, the California Supreme Court cited *Bellotti* with regard to the importance of the compelling state interests of "preserving the electoral process, preventing

corruption, and sustain[ing] the alert responsibility of the individual citizen in a democracy . . ." *Bellotti*, 435 U.S. at 788-89, yet recognized that in *Bellotti* this Court *declined* to find that the statute furthered the above goals absent a showing by record evidence that corporations corrupt the political process. Similarly, in *this* case there was *no* evidence before the California Supreme Court that the corruption which the Act was designed to counter in fact existed. *Citizens Against Rent Control*, 27 Cal. 3d at 835 (Richardson, J., dissenting). The court relied upon the speculation of political scientists, commentators, and students. *Id.* at 828-29.

While attempting to slay the imaginary dragons of political corruption and voter apathy, the Act instead serves to trample underfoot the constitutional rights of the citizens of Berkeley, by allowing the wealthy an unlimited right to express themselves on ballot measures, while permitting those who cannot afford to do so to instead contribute only a limited amount to political committees to express their views. The Act clearly serves no compelling governmental interest, and in fact runs contrary to the goals which it purportedly seeks to achieve.

In the pursuit of its legitimate interests, the city must employ "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Village of Schaumberg v. Citizens for a Better Environment*, 100 S. Ct. 826, 836 (1980). If there is no nexus between the means used to regulate the activity and the legitimate ends of the regulation, the court may disregard the ends as justification for the challenged law. *E.g., Street v. New York*, 394 U.S. 576 (1969). The Act in this case is overly broad in scope and unnecessarily interferes with the First Amendment rights of the citizens of Berkeley. Further, there is no reasonable relation between the stated goals of the Act and the means employed to reach those stated goals. Because the Act serves no compelling governmental interest, it represents an unconstitutional infringement on First Amendment rights.

III

THE ACT REPRESENTS AN UNDESIRABLE GOVERNMENTAL INTRUSION INTO THE LIVES OF THE CITIZENS OF BERKELEY

The Act represents an unnecessary and undesirable intrusion into the lives of the citizens of Berkeley. As such, it constitutes an unwarranted infringement of their First Amendment rights and is therefore unconstitutional.

This Court has recognized that "contribution restrictions could have a severe impact on political dialogue if the limitation prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. The same holds true for contribution restrictions to committees for ballot measure issues. The Act prevents complete access by the citizens of Berkeley to the marketplace of ideas in order that they can make informed decisions on ballot measure issues, after having heard as much information on the issues as the competing sides have to offer. What is essential under the First Amendment "is not that everyone shall speak, but that everything worth saying shall be said." A. MEIKLEJOHN, *supra* at 25. This insures that sound and rational judgments can be achieved "by considering all arguments which can be made to support or oppose any propositions." T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 7 (1966).

The decision of the California Supreme Court impermissibly allows the city to assume a guardianship of the public mind. *Thomas*, 323 U.S. at 545. The Court speaks of the sanctity of the ballot initiative process, which gives the public the opportunity for direct political decision making, yet it condones a scheme which limits the ability of the citizenry to effectively exercise that opportunity. In essense, the court feels that it is important to open up the political process to the public, but that the process should not be opened too far. This Court recently recognized that the First Amendment prohibits the "government from limiting the stock of information from which members of the public may draw." *Bellotti*, 435 U.S. at 784.

"The direct participation of the people in a referendum, if anything, increases the need for 'the widest possible dissemination of information from diverse and antagonistic sources.' " *Bellotti*, 435 U.S. at 790 n.29.

The citizens of Berkeley must be entrusted to decide for themselves the merits of the arguments put before them on issues of public interest. "Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They valued liberty both as an end and as a means. . . ." *Whitney*, 274 U.S. at 335 (Brandeis, J., concurring). The enactment of the Act presupposes that the messages of large contributors must be kept from the citizens of the city, for fear that they may be influenced. The fact that advocacy may persuade the electorate is hardly a reason to suppress it. *Bellotti*, 435 U.S. at 790. Further, the "right to receive information and ideas regardless of their social worth, [citations omitted], is fundamental to our free society." *Stanley*, 394 U.S. at 564. In rejecting on First Amendment grounds the highly paternalistic nature of the state statute in question in *Bellotti*, this Court recognized that

> "The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced . . . it is a danger contemplated by the Framers of the First Amendment." *Bellotti*, 435 U.S. at 791-92.

CONCLUSION

"[E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us." *Thomas*, 323 U.S. at 545. The decision of the California Supreme Court in this case conflicts with the views of this Court and of three federal Courts of Appeals. The Act violates the First Amendment rights of the

citizens of Berkeley and constitutes an unreasonable governmental intrusion into their lives. Therefore, Pacific Legal Foundation urges that the Court note probable jurisdiction in this case and reverse the decision of the California Supreme Court.

Respectfully submitted,

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